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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 XINGFEI LUO,

12 Petitioner,

13 v.

14 THE PEOPLE OF CALIFORNIA,

15 Respondent.
16

Case No. 8:22-cv-01640-MEMF (KES)

**ORDER ACCEPTING FINDINGS AND
RECOMMENDATIONS OF UNITED
STATES MAGISTRATE JUDGE**

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18 Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended
19 Petition, the records on file, and the Report and Recommendation of the United
20 States Magistrate Judge. Further, the Court has engaged in a *de novo* review of
21 those portions of the Report to which objections have been made.

22 The Report and Recommendation (“Report”) recommends the denial of the
23 First Amended Petition and the dismissal of this action with prejudice. (ECF No.
24 73.) Petitioner filed two sets of objections, which are identical. (ECF Nos. 77-78.)
25 As stated below, Petitioner’s objections to the Report do not warrant a change to
26 the Magistrate Judge’s ultimate findings or recommendations, although the Court
27 does depart slightly from the analysis as discussed below.
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1 Petitioner objects that several of her claims are not procedurally defaulted, in
2 Grounds Two, Eight, Nine, Nineteen through Twenty-Two, Twenty-Five, Twenty-
3 Nine, and Thirty. (ECF No. 77 at 1.) The Report found that these claims were
4 procedurally defaulted for various reasons: the state court found Petitioner had
5 failed to raise them on direct appeal, had failed to raise them in an objection at trial,
6 or had impermissibly raised them in a state habeas petition rather than on direct
7 appeal. (ECF No. 73 at 13, 16-18.) Petitioner disputes the correctness of the state
8 court's procedural findings in this regard. (ECF No. 77 at 2-7.) However, as the
9 Report noted, the Court does not review the correctness of the state court's
10 application of its own procedural rules. (ECF No. 73 at 18.) (citing *Poland v.*
11 *Stewart*, 169 F.3d 573, 584 (9th Cir. 1999) (as amended) ("Federal habeas courts
12 lack jurisdiction . . . to review state court applications of state procedural rules")).

13 Petitioner objects that, even if the claims are procedurally defaulted, she
14 showed cause and prejudice excusing the default, based on ineffective assistance of
15 appellate counsel. (ECF No. 77 at 8-37.) Petitioner's claims of ineffective
16 assistance of appellate counsel cannot establish cause because, as the Report noted,
17 Petitioner did not exhaust the ineffective-assistance-of-appellate-counsel claims in
18 state court. (ECF No. 73 at 21-22.) (citing *Edwards v. Carpenter*, 529 U.S. 446,
19 451-52 (2000)). Although Petitioner argues that she "relied on the Court's initial
20 review to exhaust her claims" (ECF No. 77 at 9), this does not excuse the
21 procedural default. The Court had no duty to perform an initial review of her
22 claims and then advise her that she may need to exhaust claims of ineffective
23 assistance of appellate counsel as a possible means to avoid a potential procedural
24 default. "Requiring district courts to advise *pro se* litigants in such a manner would
25 undermine [federal] judges' role as impartial decisionmakers." *Pliler v. Ford*, 542
26 U.S. 225, 231 (2004).

27 Petitioner objects that, even if the claims are procedurally defaulted, she has
28 satisfied the gateway for a fundamental miscarriage of justice, or actual innocence.

1 (ECF No. 77 at 37.) Petitioner argues that there was evidence that purportedly
2 “destroyed” the victim’s credibility. (*Id.*) Evidence that undermines a witness’s
3 credibility, however, is insufficient to show actual innocence. *See Calderon v.*
4 *Thompson*, 523 U.S. 538, 563 (1998) (impeachment evidence is insufficient to
5 establish actual innocence because it “is a step removed from evidence pertaining to
6 the crime itself”) (*citing Sawyer v. Whitley*, 505 U.S. 333, 348 (1992)); *Gandarela*
7 *v. Johnson*, 286 F.3d 1080, 1086 (9th Cir. 2002) (“[S]peculative and collateral
8 impeachment falls far short of showing actual innocence.”).

9 For Grounds One and Three, Petitioner objects that her First Amendment
10 rights were violated from her conviction for disseminating photographs of the
11 victim and from the enforcement of a family court’s protective order. (ECF No.77
12 at 37-46.) But the dissemination of the photographs and the violation of the
13 protective order were integral to criminal conduct in harassing the victim and,
14 therefore, were not protected online speech. (ECF No. 73 at 63-65.)

15 For Grounds Four through Six, Petitioner objects that the prosecutor
16 suppressed favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83
17 (1963). (ECF No. 77 at 46-54.) The allegedly suppressed evidence consisted of
18 two police field reports and evidence of the victim’s misdemeanor convictions.
19 (*Id.*) It was not objectively unreasonable for the state court to conclude that
20 Petitioner had failed to show prejudice from the alleged suppression of this
21 evidence. (ECF No. 73 at 67-68.) The prosecutor presented strong evidence at trial
22 establishing that Petitioner had posted private statements and photographs
23 involving the victim online and had vandalized his front door. (*Id.* at 69-72.) Thus,
24 there was no reasonable probability that, if the allegedly suppressed evidence had
25 been disclosed, the result of the trial would have been different.

26 For Ground Seven, Petitioner objects that the prosecutor knowingly
27 presented false testimony from the victim. (ECF No. 77 at 54-57.) The victim
28 allegedly testified falsely that Petitioner had threatened to publish his photographs

1 and then carried through with that threat. (ECF No. 73 at 73.) Because Petitioner
2 has not shown that this testimony was false, her claim is meritless. (*Id.* at 74-75.)

3 For Ground Eleven, Petitioner objects that her trial counsel was ineffective
4 for failing to present facts to the jury. (ECF No. 77 at 57-59.) The alleged facts
5 consisted of an email exchange in which the victim falsely accused Petitioner of
6 vandalism and evidence of the victim's history as a "nudist." (ECF No. 73 at 78.)
7 But the email exchange does not include an accusation of vandalism. (ECF No. 6 at
8 165.) Moreover, Petitioner's trial counsel made an informed and strategic decision
9 not to present evidence of the victim's history as a nudist because "the less
10 information the better." (ECF No. 33 at 56, 108.) Thus, this claim is meritless.

11 For Grounds Twelve and Thirteen, Petitioner objects that her trial counsel
12 was ineffective for failing to request an instruction defining a dating relationship
13 and for stipulating to the validity of the family court's protective order. (ECF No.
14 77 at 59-63.) As the Report noted, the instruction was not relevant to any element
15 of a charged offense. (ECF No. 73 at 82.) Although Petitioner argues that an
16 instruction defining a dating relationship was relevant to the question of whether
17 the victim had a reasonable expectation of privacy against the public dissemination
18 of his nude photographs (ECF No. 77 at 60), the Court finds this argument is
19 without merit. Although presumably the nature of the relationship that the
20 Petitioner and victim were in is relevant to whether the victim had the requisite
21 expectation of privacy, whether that relationship met the legal definition of a
22 "dating relationship" is not.¹ Moreover, Petitioner's trial counsel had a strategic
23 reason to stipulate to the validity of the protective order, which was to avoid having
24 it shown to the jury. (*Id.* at 81.) Although Petitioner argues that her trial counsel
25 never explicitly offered this reason (ECF No. 77 at 61), this argument fails to
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27 ¹ And although this Court might depart from the Report's characterization of Luo's other argument on
28 this—that the victim did not have the requisite expectation of privacy because he was a nudist—as
"ludicrous," (ECF No. 73 at 79), the Court agrees with the thrust of the Report on this point. The idea that a
nudist cannot have the requisite expectation of privacy is without basis in law or common sense.

1 satisfy Petitioner's burden to prove ineffective assistance. *See Dunn v. Reeves*, 594
2 U.S. 731, 743 (2021) (*per curiam*) (recognizing that "a silent record cannot
3 discharge a prisoner's burden" to prove ineffective assistance of counsel) (citing
4 *Burt v. Titlow*, 571 U.S. 12, 15 (2013)). Thus, these claims are meritless.

5 For Ground Fourteen, Petitioner objects that her trial counsel was ineffective
6 for presenting no legal argument to exclude her family-court testimony. (ECF No.
7 77 at 63-66.) But the trial court allowed the testimony after ruling that it was not
8 obtained in violation of Petitioner's Fifth Amendment rights. (ECF No. 3 at 276-
9 80.) Because an argument by trial counsel on this evidentiary issue would have
10 been futile, trial counsel could not have been ineffective for the alleged failure to
11 make it. (ECF No. 73 at 83.) Thus, this claim is meritless.

12 For Grounds Fifteen and Sixteen, Petitioner objects that her trial counsel was
13 ineffective for failing to expose the victim's false and inconsistent statements
14 concerning the damage to his door. (ECF No. 77 at 66-67.) Petitioner has not
15 shown that the victim lied or made inconsistent statements about the damage to his
16 door. (ECF No. 73 at 84.) Petitioner also has not shown that any witness would
17 have testified that the victim lied about the damage to the door. (*Id.*) Although
18 Petitioner argues that such witnesses were the police officers who wrote the police
19 field reports (ECF No. 77 at 67), this is pure speculation. Thus, these claims are
20 meritless.

21 For Ground Seventeen, Petitioner objects that her trial counsel was
22 ineffective for failing to raise objections at trial. (*Id.* at 67-70.) Petitioner has
23 failed to show that it was strategically unreasonable or prejudicial for trial counsel
24 not to argue that a juror should be removed for financial hardship. (ECF No. 73 at
25 85-86.) The trial court refused to excuse the juror, and Petitioner cites no argument
26 that her trial counsel could have made to change this decision, particularly since the
27 trial was expected to last only one more day. (*Id.* at 86.) Thus, this claim is
28 meritless.

1 For Ground Eighteen, Petitioner objects that her trial counsel was ineffective
2 for failing to ensure Petitioner's right to a speedy trial. (ECF No. 77 at 70-72.) But
3 Petitioner waived time on multiple occasions. (ECF No. 3 at 210.) Moreover, trial
4 counsel sought continuances for the proper purpose of preparing for trial, and
5 Petitioner's original trial date coincided with the outbreak of COVID-19. (*Id.* at
6 207, 210.) Petitioner argues that her trial counsel failed to prepare adequately for
7 trial, meaning that Petitioner's waivers were involuntary. (ECF No. 77 at 71.) But
8 this argument is contrary to the record, which shows that Petitioner had six public
9 defenders during the case and that her trial counsel was appointed in June 2021,
10 shortly before the trial in July 2021. (ECF No. 3 at 209, 218.) Because Petitioner's
11 right to a speedy trial was not violated, this claim is meritless.

12 For Ground Ten, Petitioner objects that her trial counsel was ineffective for
13 failing to cross-examine the victim adequately during the trial. (ECF No. 77 at 72-
14 79.) As the Report found, however, Petitioner has not shown that trial counsel's
15 cross-examination was objectively unreasonable. (ECF No. 73 at 90-91.) The
16 proposed lines of questions -- about the victim's ten-year-old misdemeanor
17 convictions, about "metadata" showing forgery, or about the victim's marriage --
18 would not have been permitted or would not have benefited the defense. (*Id.*)
19 Moreover, "counsel's tactical decisions at trial, such as refraining from cross-
20 examining a particular witness or from asking a particular line of questions, are
21 given great deference and must similarly meet only objectively reasonable
22 standards." *Dow v. Woods*, 211 F.3d 480, 487 (9th Cir. 2000). Thus, this claim is
23 meritless.

24 For Ground Twenty-Four, Petitioner objects that the police conducted a
25 deficient investigation. (ECF No. 77 at 79-80.) The investigation allegedly would
26 have shown that the victim manipulated the digital evidence. (*Id.*) As the Report
27 found, however, there is no clearly established federal law recognizing a
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1 constitutional right to have the police investigate a crime in any particular way.
2 (ECF No. 73 at 94.) Thus, habeas relief is unavailable for this claim.

3 For Ground Twenty-Six, Petitioner objects that the prosecutor improperly
4 amended the Complaint on the day before trial. (ECF No. 77 at 80-83.) The
5 amendment concerned the count for violation of a protective order. (ECF No. 73 at
6 97.) The state court's rejection of this claim was not objectively unreasonable.
7 (ECF No. 51-2 at 6.) As the state court found, the amendment "was not so
8 significant that it warranted a delay of [Petitioner's] jury trial for counsel to prepare
9 for the amended charge," and Petitioner's arguments were "conclusory." (*Id.*) The
10 amendment was made prior to trial, and Petitioner's counsel did not request a
11 continuance but commented he was "anticipating" the amendment. (ECF No. 73 at
12 99; ECF No. 3 at 267.) Thus, this claim is meritless.

13 For Ground Twenty-Seven, Petitioner objects that her right to a speedy trial
14 was violated. (ECF No. 77 at 83-84.) The state court's rejection of this claim was
15 not objectively unreasonable. (ECF No. 3 at 8-9.) Petitioner "consistently entered
16 general or statutory time waivers from August 2019, when she was arraigned, to
17 June 2021, a month before trial." (*Id.*) Moreover, delays caused by the COVID-19
18 pandemic did not support a speedy trial violation, Petitioner was not incarcerated
19 during the delay, and Petitioner points to no evidence that was lost because of the
20 delay. (ECF No. 73 at 102-04.) Thus, this claim is meritless.

21 The Court notes that the Report found that counsel was not required to obtain
22 Petitioner's express permission to waive time. The Court departs from the Report
23 with respect to this determination as it does not acknowledge that under California
24 law, counsel is required to obtain express permission of the defendant to waive the
25 defendant's *statutory* right to a speedy trial. *See* California Penal Code 1382(a)(3).
26 But any claim based solely on the California statutory right to a speedy trial would
27 not be cognizable on federal habeas review because it exclusively concerns
28 California law. *See Waddington v. Sarausad*, 555 U.S. 179, 192 n.5 (2009) ("[W]e

1 have repeatedly held that ‘it is not the province of a federal habeas court to
2 reexamine state-court determinations on state-law questions.’” (quoting *Estelle v.*
3 *McGuire*, 502 U.S. 62, 67-68 (1991)).

4 For Ground Twenty-Eight, Petitioner objects that the state trial court erred in
5 refusing to consider her motion to dismiss on speedy trial grounds. (ECF No. 77 at
6 84-86.) As the Report found, the trial court’s alleged error in refusing to consider
7 the motion, based on untimeliness and failure to provide proper notice, involves a
8 matter of state procedural law that is not cognizable as a federal habeas claim.
9 (ECF No. 73 at 105.) And as the Report further found, the trial court had rejected
10 the basis for the motion, *i.e.*, an alleged violation of Petitioner’s speedy trial rights.
11 (*Id.* at 106.) Thus, this claim is meritless.

12 For Ground Thirty-Two, Petitioner objects that her appellate counsel was
13 ineffective for filing a brief under *People v. Wende*, 25 Cal. 3d 436 (1979), instead
14 of presenting substantive arguments on appeal. (ECF No. 77 at 86-88.) But
15 Petitioner has not identified a nonfrivolous issue that appellate counsel failed to
16 raise and that with a reasonable probability would have prevailed on appeal had
17 appellate counsel done so. (ECF No. 73 at 110.) Although Petitioner identifies the
18 issues raised in this action (ECF No. 77 at 87), they are not meritorious for the
19 reasons explained in detail in the Report. Thus, Petitioner’s claim of ineffective
20 assistance of appellate counsel is meritless.

21 For Ground Thirty-Five, Petitioner objects that the trial court erred in
22 instructing the jury on the charged crime of violating a protective order. (ECF No.
23 77 at 88-90.) In particular, as acknowledged in the Report, the instruction did not
24 state that the violation, as charged in the amended Complaint, specifically consisted
25 of the alleged failure to deactivate websites or creation of new websites. (ECF No.
26 3 at 159.) However, the state court’s rejection of this claim was not objectively
27 unreasonable. (ECF Nos. 51-6, 51-7.) Petitioner has not shown that the instruction
28 was in error. The instruction did not purport to describe the specific conduct which

1 constituted violation of the order. Overwhelming evidence at trial showed that
2 Petitioner failed to deactivate websites and created new websites concerning the
3 victim, which was a violation of the stipulated-to order. (ECF No. 73 at 116-17.)
4 Although Petitioner argued at trial that someone else might have created those
5 websites (*id.* at 118), the evidence overwhelming contradicted that defense, and that
6 had nothing to do with the proper language in the instruction.

7 Finally, Petitioner requests an evidentiary hearing, apparently for a claim of
8 actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995). (ECF No. 77 at 90-
9 91.) The offered evidence of actual innocence consists of Petitioner’s “acquittal on
10 identical evidence in Petitioner’s second trial,” which “serves as compelling
11 evidence of innocence.” (*Id.* at 90.) But a verdict from a different, subsequent case
12 is not competent evidence of actual innocence in this case. A claim of actual
13 innocence must be based on “new reliable evidence—whether it be exculpatory
14 scientific evidence, trustworthy eyewitness accounts, or critical physical
15 evidence—that was not presented at trial.” *Schlup*, 513 U.S. at 324. Petitioner has
16 not offered any such evidence. Thus, Petitioner’s request for an evidentiary hearing
17 is denied.

18 19 ORDER

20 It is ordered that (1) the Report and Recommendation of the Magistrate Judge
21 is accepted and adopted; (2) Petitioner’s request for an evidentiary hearing is
22 denied; and (3) Judgment shall be entered denying the First Amended Petition with
23 prejudice.

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25 DATED: February 5, 2025



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28 MAAME EWUSI-MENSAH FRIMPONG
UNITED STATES DISTRICT JUDGE